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IN THE COURT OF APPEALS OF INDIANA

STEVEN W. KAMP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 66A05-0604-CR-202
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PULASKI SUPERIOR COURT
The Honorable Patrick B. Blankenship, Judge
Cause No. 66D01-0505-FC-2

March 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Steven Kamp appeals his conviction and sentence for child molesting as a class C felony.[1] Kamp raises three issues, which we revise and restate as:

I. Whether the trial court erred when it admitted the victim's videotaped statement;

II. Whether the evidence is sufficient to support Kamp's conviction; and

III. Whether Kamp's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. Tina Cress had two children, H.C., a seven-year-old daughter, and K.C., a ten-year-old son, by her ex-husband, Craig Cress. Kamp and Tina had been involved in a relationship for almost three years, had been living together for almost two years, and had just gotten engaged. On May 10, 2005, Kamp came home from work at around 6:30 p.m. and drank five beers. The children were put to bed around 8:00 p.m., and Kamp and Tina argued about her ex-husband. Around 8:30 or 9:00 p.m., Kamp asked Tina if she was going to bed, and Tina told him she was going to stay up to watch the news. Kamp became upset, went to bed, got back up to get a drink of water, and argued with Tina because she would not go to bed. Tina fell asleep on the couch.

Later that evening, Kamp entered H.C.'s room, unbuttoned his buttons on his pajama pants, grabbed H.C.'s wrist, and made H.C. touch his penis, which was "[s]quishy

[1] Ind. Code § 35-42-4-3 (2004).

and soft." Transcript at 244. H.C. tried to pull her arm back, but Kamp was too strong and pulled H.C.'s arm back. Kamp eventually left the room after about ten minutes and went to bed. H.C. went and lay on the couch next to Tina because she was scared that Kamp was going to do it again and do it to Tina.

Tina woke up in the middle of the night to find H.C. lying on the couch with her. In the morning, Tina woke her children and got them breakfast as usual. H.C. ate her breakfast, went into the bathroom, and asked Tina to come into the bathroom because she wanted to tell her something. H.C. told Tina that Kamp had gone into her room, grabbed her wrist, and made her touch his "[p]ee-pee." Id. at 189. H.C. also told Tina that she tried to pull away but Kamp was too strong and would not let go of her. Tina took H.C. into the garage and asked H.C. to explain what had happened, and H.C. told Tina the same story again. H.C. would not go back into the house to get dressed for school because she was scared, so Tina brought H.C.'s clothes to the garage.

Tina woke up Kamp and told him that he needed to get out of the house. When Kamp asked what was going on, Tina told Kamp what H.C. had told her, and Kamp said "awe [sic] come on" and did not take the situation seriously. Id. at 192. Kamp told Tina that the three of them needed to sit down and talk. Tina asked H.C. to come inside and told H.C. that Kamp wanted to tell her something. Kamp told H.C. that she was having a dream in the middle of the night, that he went into her room, shook her, and woke her to tell her that she was dreaming. H.C. told Kamp that he was lying. Tina then took the children and left.

Tina dropped the children off at school and returned home. When Tina returned home, Kamp told her that she should keep an eye on the sky because it looked like it was going to storm. Tina "went off," said, "you really think I'm concerned on [sic] what the weather is going to do today," and decided to leave. Id. at 195. Tina went to her sister's house and then picked up H.C. from school. Tina called Craig to tell him about the situation, and Tina and H.C. met Craig at a park. They then left the park and drove to the police station. Winamac Police Officer Mike Buchanan interviewed H.C. and videotaped the interview.

The State charged Kamp with child molesting as a class C felony. At the trial, Tina testified, H.C. testified, and then the State offered the videotape of H.C.'s interview as evidence. Kamp's attorney objected on the grounds that the videotape was "cumulative and emphasize[d] testimony." Id. at 223. After a discussion, the trial court denied Kamp's objection and admitted the videotape. The prosecutor played the videotape for the jury. The jury found Kamp guilty as charged. The trial court sentenced Kamp to eight years in the Indiana Department of Correction.

I.

The first issue is whether the trial court erred when it admitted H.C.'s videotaped statement. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied. Even if the trial court's decision

was an abuse of discretion, we will not reverse if the admission constituted harmless error. Fox v. State, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), reh'g denied, trans. denied. Kamp appears to argue that the videotape is inadmissible because: (A) the videotape is hearsay; and (B) the videotape was cumulative of Tina and H.C.'s testimony and resulted in a drumbeat of repetition that prejudiced the jury.

A. Hearsay

Ind. Code § 35-37-4-6 (Supp. 2005)[2] governs the admissibility of a videotaped statement of a "protected person."[3] Kamp does not argue that the elements of Ind. Code

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[2] Subsequently amended by Pub. L. No. 173-2006, § 48 (eff. July 1, 2006).

[3] Ind. Code § 35-37-4-6 provides, in pertinent part:

> (d) A statement or videotape that:
>
> (1) is made by a person who at the time of trial is a protected person;
> (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
> (3) is not otherwise admissible in evidence;
>
> is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.
>
> (e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:
>
> (1) The court finds, in a hearing:
>
> (A) conducted outside the presence of the jury; and
> (B) attended by the protected person;
> that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

§ 35-37-4-6 were not met. Kamp concedes that Ind. Code § 35-37-4-6(c) "seems to allow the admission of a prior consistent statement of a protect [sic] person who testifies at trial and is subject to cross-examination[.]" Appellant's Brief at 8. Rather, Kamp argues that "this interpretation of the statute runs afoul of Ind. Rule of Evidence 801(d)(1)" and that Ind. Rule of Evidence 801(d)(1) should govern the admissibility of the videotape. Appellant's Brief at 8. Ind. Rule of Evidence 801(d) states:

> (d) Statements Which are Not Hearsay. A statement is not hearsay if:
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> > (1) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose; or (C) one of identification of a person made shortly after perceiving the person . . . .

Kamp argues that "[w]hen an evidence rule covers a particular area, common law rules and statutes are to be disregarded." Id. The Indiana Supreme Court has held that "when an Evidence Rule and a statute address the same subject matter, the Rule controls to the extent there are any differences." McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (internal citation omitted).

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(2) The protected person:

(A) testifies at the trial; or . . . .

The State points out that Ind. Evidence Rule 802 states that "[h]earsay is not admissible *except as provided by law* or by these rules." (Emphasis added). The Indiana Supreme Court has held that Ind. Code § 35-37-4-6 "is a provision 'by law,' and does not conflict with Rule 802." Pierce v. State, 677 N.E.2d 39, 43 n.6 (Ind. 1997). Thus, there are no conflicts between Ind. Code § 35-37-4-6 and Ind. Evidence Rules 801(d) and 802, and the trial court did not abuse its discretion by admitting the videotape. See, e.g., Trujillo v. State, 806 N.E.2d 317, 329 (Ind. Ct. App. 2004) (holding that the trial court did not abuse its discretion by admitting victim's videotaped interview).

B. Drumbeat

Kamp also appears to argue that the trial court erred by admitting the videotape because the videotape was cumulative of Tina and H.C.'s testimony[4] and resulted in a "drumbeat" of repetition that prejudiced the jury.[5] Kamp relies on Modesitt v. State, 578

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[4] We note that Kamp did not object to Tina's testimony.

[5] Kamp argues for the first time in his reply brief that the videotape was cumulative of the testimony of Officer Buchanan, the officer who interviewed H.C. Specifically, Kamp argues that:

> [H.C.]'s mother detailed what [H.C.] had told her. [H.C.]'s mother could not be cross-examined about the content of [H.C.]'s statement to her. Then the officer who interviewed [H.C.] laid the foundation for the admission of [H.C.]'s videotaped statement. He, too, could not be cross-examined about the content of [H.C.]'s statement to him. After the jury twice heard [H.C.]'s words that could not be challenged through the witnesses who presented them, the jury then heard [H.C.] testify and be cross-examined.

Appellant's Reply Brief at 2. The record reveals that Officer Buchanan testified after H.C. Further, the record reveals that Officer Buchanan did not specifically testify what H.C. stated to him. Rather, Officer Buchanan testified, without objection, that "[p]rior to conducting the interview I spoke to Deputy Rogers and asked him what he was working and he said that he had a seven year old girl whose mother had brought her in and said that she was alleging child, that she was abused by a person living in her

N.E.2d 649, 652 (Ind. 1991), in which the Indiana Supreme Court reversed a child molesting conviction because, over the defendant's objection, the victim's mother, caseworker, and psychologist all testified about the victim's hearsay statements to them before the victim testified. The court concluded that it "could not say that the drumbeat repetition of the victim's original story prior to calling the victim to testify did not unduly prejudice the jury which convicted [the defendant]." 578 N.E.2d at 651-52. The court reversed the defendant's convictions based on the conclusion that "the trial court, in this case, allowed, over objection, the drumbeat repetition of the declarant's statements prior to the declarant's testifying and being subject to cross examination." Id. at 654.

The State argues that Kamp waived this issue because he did not object to the admission of Tina's testimony concerning what H.C. had told her about the incident and objected to the admission of the videotape only as "cumulative" evidence. Even assuming that Kamp did not waive the issue of the admission of the videotape, we conclude that that the admission of the videotape was harmless.

Here, the videotape was introduced into evidence only after H.C. had testified and was available for cross-examination. Cf. Jeffers v. State, 605 N.E.2d 196, 199 (Ind. Ct. App. 1992) (holding that "the fact that the statements are admitted before the declarant can be cross-examined is a factor that, like mere repetition, dilutes the effectiveness of cross-examination"). Unlike in Modesitt where numerous witnesses testified regarding

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household at that time." Transcript at 241.

the victim's statements to them, here, only H.C.'s mother testified regarding H.C.'s statements to her. Under these circumstances, the admission of the videotaped interview did not amount to the drumbeat of repetition that the Indiana Supreme Court condemned in Modesitt. See, e.g., Willis v. State, 776 N.E.2d 965, 968 (Ind. Ct. App. 2002) (holding that testimony and videotaped interview did not amount to the drumbeat of repetition condemned in Modesitt); McGrew v. State, 673 N.E.2d 787, 796 (Ind. Ct. App. 1996) (holding that the improper admission of hearsay testimony from two witnesses whose testimony was "brief and consistent with" the victim's testimony did not "constitute drumbeat repetition of the victim's statements"), reh'g denied, summarily affirmed in relevant part by 682 N.E.2d 1289, 1292 (Ind. 1997); Molina v. State, 621 N.E.2d 1137, 1140 (Ind. Ct. App. 1993) (holding that Modesitt was distinguishable because Modesitt involved the "drum-beat repetition" of witnesses that improperly bolstered the testimony of another witness, resulting in prejudice to the defendant, whereas "[h]ere, [the witness] testified to his first-hand knowledge of the conversations that transpired between himself and Molina" and "[h]is testimony was not bolstered by that of other witnesses").

II.

The next issue is whether the evidence is sufficient to support Kamp's conviction. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of

probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of child molesting as a class C felony is governed by Ind. Code § 35-42-4-3, which provides that "[a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony." Thus, to convict Kamp of child molesting as a class C felony, the State needed to prove: (1) that Kamp; (2) performed or submitted to any fondling or touching; (3) of either H.C., a child under fourteen years of age, or Kamp; (4) with the intent to arouse either H.C. or Kamp.

Kamp argues that "the essential element of the intent to satisfy or arouse sexual desires is constitutionally lacking." Appellant's Brief at 5. Kamp emphasizes that he admitted in his statement to investigating officers that he had heard H.C. talking in her sleep, went to awaken her, grabbed her arm and shook it to awaken her. Kamp argues that while he was attempting to awaken H.C., "his penis must have been exposed accidentally," "H.C. grabbed his penis," and Kamp "got [H.C.] to release his penis and left the room." Id. at 6. To the extent that Kamp emphasizes his statements, Kamp merely asks that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Jordan, 656 N.E.2d at 817.

Kamp also argues that the evidence is insufficient to prove an intention to arouse himself or H.C. because he did not have an erection. "A person's intent may be

determined from their conduct and the natural consequences thereof and intent may be inferred from circumstantial evidence." J.J.M. v. State, 779 N.E.2d 602, 606 (Ind. Ct. App. 2002). "Furthermore, the intent to gratify required by the statute must coincide with the conduct; it is the purpose or motivation for the conduct." Id.

Kamp's intent may be inferred from his conduct and the natural consequences thereof. The record reveals that Kamp entered H.C.'s room, unbuttoned his buttons on his pajama pants, grabbed H.C.'s wrist, and forced H.C. to touch his penis. H.C. tried to pull her arm back, but Kamp was too strong and pulled H.C.'s arm back. Kamp eventually left the room after about ten minutes. This evidence is sufficient to demonstrate that Kamp was acting with the intent to arouse or satisfy his own sexual desires. See, e.g., Craun v. State, 762 N.E.2d 230, 239 (Ind. Ct. App. 2002) (holding that the evidence was sufficient to support finding that defendant touched the victim with the intent to arouse or satisfy his sexual desires), trans. denied.

III.

The next issue is whether Kamp's sentence is inappropriate in light of the nature of the offense and the character of the offender. Kamp argues that his sentence is inappropriate because he received the maximum punishment of eight years on his conviction for child molestation as a class C felony. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the

offense and the character of the offender." Kamp argues that he is "hardly the worst offender warranting the maximum punishment." Appellant's Brief at 11.

The Indiana Supreme Court has held that "the maximum possible sentences are generally most appropriate for the worst offenders." Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id. Thus, we must determine whether this case falls within the class of offenses and offenders that warrant the maximum punishment.

Our review of the nature of the offense reveals that Kamp had been involved in a relationship with Tina, H.C.'s mother, for three years and had just gotten engaged to Tina. Kamp, Tina, H.C., and K.C., had been living together for almost two years. Kamp drank five beers and argued with Tina. Later that evening, Kamp entered seven-year-old H.C.'s room, unbuttoned his pajama pants, grabbed H.C.'s wrist, and forced her to touch his penis. H.C. tried to pull her arm back but Kamp was too strong and pulled H.C.'s arm back. Kamp eventually left the room after about ten minutes.

Our review of the character of the offender reveals that Kamp has a juvenile adjudication in 1972 for assault and battery and adult convictions for false and fictitious registration, failure to appear, reckless driving, operating a vehicle with a blood alcohol

content of .10% or more, and domestic battery as a class A misdemeanor in which H.C.'s mother was the victim. Kamp was on probation for the domestic battery conviction when he committed the present offense. One of Kamp's former employers stated that Kamp "was terminated because of '[t]heft and lack of trust.'" Presentence Investigation Report at 5. Kamp was in a position of trust with H.C. When initially confronted, Kamp said "awe [sic] come on" and was not taking the situation seriously. Transcript at 192. Kamp also told H.C. that she was dreaming and only later told the police that H.C. had grabbed his penis.

Given the nature of the offense and the character of the offender, we cannot say that this case is outside the class of offenses and offenders that warrant the maximum punishment. After due consideration of the trial court's decision, we cannot say that the sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Leffingwell v. State, 810 N.E.2d 369, 372 (Ind. Ct. App. 2004) (holding that the trial court's decision to impose the maximum sentence of eight years for child molesting as a class C felony was not inappropriate).

For the foregoing reasons, we affirm Kamp's conviction and sentence for child molesting as a class C felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur